

- (iv) The following requirements shall apply if sealed bids are used: (1) the invitation for bids shall be publicly advertised, solicited from an adequate number of known suppliers, and provide bidders with sufficient time to respond; (2) the invitation shall include any specifications and pertinent attachments, and define the items or services to allow the bidder to respond properly; (3) all bids shall be publicly opened at the time and place prescribed in the invitation for bids; and (4) a firm fixed-price Contract award shall be made in writing to the lowest responsive and responsible bidder. Any or all bids may be rejected if there is a sound documented reason.
- (v) Procurement By Competitive Proposals. Competitive proposals are normally conducted when more than one source submits an offer for either a fixed-price or cost-reimbursement type contract, and when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements shall apply: (1) requests for proposals shall be publicized and identify all evaluation factors and their relative importance; (2) proposals shall be solicited from an adequate number of qualified sources; (3) the Government of the Republic of the Marshall Islands shall have a method for conducting technical evaluations of the proposals and for selecting awardees; and (4) awards shall be made to the firm whose proposal is most advantageous to the program. Competitive proposals may also be used when price is not a factor but only to procure architectural and engineering services. It cannot be used to purchase other types of services provided by architectural and engineering firms that are a potential source to perform the proposed effort.
- (vi) Procurement By Noncompetitive Proposals. Noncompetitive proposals are procurement through the solicitation of only one source or when competition is determined inadequate after soliciting a number of sources. This method shall be used only when the award of a Contract is infeasible under either procedures for small purchase, sealed bids or competitive proposals, and when one of the following circumstances applies: (1) the item is available only from a single source; (2) public exigency or emergency will not permit a delay resulting from competitive solicitation; or (3) competition is determined to be inadequate after the solicitation of a number of sources. Cost analysis shall be required to verify the proposed cost

data, the projections of the data, and the evaluation of the specific elements of costs and profits.

(11) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(12) United States Review:

(i) The Government of Republic of the Marshall Islands shall make available, upon request of the Government of the United States, technical specifications on proposed procurements.

(ii) The Government of Republic of the Marshall Islands shall make available, upon request of the Government of the United States, pre-award procurement documents, including but not limited to requests for proposals or invitations for bids and independent cost estimates, when: (1) procurement procedures fail to comply with the standards set forth in this section; (2) the procurement is expected to exceed \$100,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; (3) the proposed award is more than \$100,000 and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or (4) a proposed Contract modification changes the scope of a Contract or increases the Contract amount by more than \$100,000.

(13) Bonding Requirements. For construction or facility improvement Contracts or sub-Contracts exceeding \$100,000, the Government of the United States may accept the bonding policy and requirements of the Grantee or Sub-Grantee provided the United States determines that its interests are adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(i) Bid Guarantee. Each bidder shall guarantee an equivalent of five percent of the bid price pursuant to a bid guarantee that complies with the requirements of this clause (i). The bid guarantee shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying the bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(ii) Performance Bond. The contractor shall execute a Performance Bond for one hundred percent of the Contract price. A Performance Bond is one executed in connection

with a Contract to secure fulfillment of all the contractor's obligations under such contract.

- (iii) Payment Bond. The contractor shall execute a Payment Bond for one hundred percent of the Contract price. A Payment Bond is one executed in connection with a Contract to assure the lawful payment of all persons supplying labor and material in the execution of the contract.

(14) Contract Provisions. All Contracts paid with funds provided pursuant to the Compact, as amended, shall contain the following provisions:

- (i) For Contracts in excess of \$100,000: administrative, contractual, or legal remedies in instances where contractors violate or breach Contract terms, and the provision of such sanctions and penalties as appropriate;
- (ii) For Contracts in excess of \$100,000: Termination for cause and for convenience by the Grantee or Sub-Grantee including the manner by which it will be effected and the basis for settlement;
- (iii) Compliance with the local statutes regarding kickbacks and corrupt practices;
- (iv) Access by the Government of the Republic of the Marshall Islands and its Sub-Grantees, the Government of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific Contract for the purpose of making audit, examination, excerpts, and transcriptions;
- (v) Retention of all required records for three years after Grantees or Sub-Grantees make final payments and all other pending matters are closed; and
- (vi) Compliance with all applicable standards, orders, or requirements issued under local environmental laws.

(k) Sub-Grants:

- (1) The Government of the Republic of the Marshall Islands will follow its laws and procedures when awarding and administering Sub-Grants. The Governments shall ensure that:
  - (i) Every Sub-Grant includes any clauses required by the Compact, as amended, Grant awards and this Agreement;

- (ii) Sub-Grantees are aware of requirements imposed upon them by the Compact, as amended, Grant awards and this Agreement; and
- (iii) The Sub-Grantee can meet the financial management standards of this Agreement.

2. Program Monitoring, Performance Reports and Records Retention:

(a) Monitoring and reporting Grant program performance by the Government of the Republic of the Marshall Islands:

- (1) The Government of the Republic of the Marshall Islands shall be responsible for the management and monitoring of the day-to-day operations of all Grants and their activities, to assure compliance with all applicable Grant terms and conditions. Monitoring shall cover each program, function, or activity to ensure the achievement of performance goals.
- (2) The Government of the Republic of the Marshall Islands shall submit quarterly performance reports on each Grant. The reports shall be due 30 days after the reporting period.
- (3) The Government of the Republic of the Marshall Islands and the Government of the United States shall agree on a uniform format for performance reports. Performance reports for each Grant shall contain a summary of the following:
  - (i) A comparison of actual accomplishments to the objectives and indicators established for the period;
  - (ii) Any positive events that accelerate performance outcomes;
  - (iii) Any problems or issues encountered, reasons, and impact on Grant activities and performance measures;
  - (iv) Additional pertinent information including, when appropriate, an analysis and explanation of cost overruns.
- (4) The Government of the Republic of the Marshall Islands shall require performance reports from its Sub-Grantees.

(b) Construction Performance Reports. Unless otherwise agreed, the Government of the Republic of the Marshall Islands shall submit quarterly performance reports on each project funded pursuant to the Compact, as amended, to the Government of the United States.

(c) Significant Developments. Events may occur between the scheduled performance reporting dates that have significant impact upon a Grant supported activity. In such cases, the Government of the Republic of the Marshall Islands

shall immediately inform the Government of the United States when the following conditions arise:

- (1) Problems, delays, or adverse conditions that will materially impair the ability of the Government of the Republic of the Marshall Islands to meet the terms and conditions of Grant. This disclosure must include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.
- (2) Favorable developments that enable the meeting of time schedules and objectives sooner or at less cost than anticipated, or that produce more beneficial results than anticipated.

(d) The Government of the United States may make site visits as warranted by program needs.

(c) Waivers and Extensions:

- (1) The Government of the United States may waive any required performance report.
- (2) The Government of the Republic of the Marshall Islands may extend the due date for any performance report from a Sub-Grantee provided its reporting obligations to the Government of the United States are met.

(f) Frequency:

- (1) The Government of the United States may prescribe an alternative reporting frequency for a project or program. If no frequency is specified, the report shall be submitted annually.
- (2) A final report shall be required upon the completion or termination of each infrastructure or capacity building project.

(g) Due Date:

- (1) When reports are required on a quarterly or semiannual basis, they shall be due 30 days after the reporting period. When required on an annual basis, they shall be due 90 days after the end of the Grant year.
- (2) Final reports shall be due 90 days after the completion or termination of each infrastructure or capacity building Grant project.

(h) Retention and Access Requirements for Records:

- (1) Applicability. This clause (h) applies to all financial and programmatic records, supporting documents, statistical records, and other records of the Government of the Republic of the

Marshall Islands or its Sub-Grantees which are required to be maintained by this Agreement, program regulations or the Grant agreement, or are otherwise considered as pertinent to program regulations or the Grant agreement. Records of contractors or subcontractors are exempt from the requirements of this clause (h).

- (2) Length of Retention. Except as otherwise provided, records must be retained for three years from the date the Government of the Republic of the Marshall Islands submits the final project report to the Government of the United States.
- (3) If any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the three-year period, the records shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later.
- (4) Access to Records of the Government of the Republic of the Marshall Islands and Its Sub-Grantees. The Government of the United States shall have the right of access to any pertinent books, documents, papers, or other records of the Government of the Republic of the Marshall Islands and its Sub-Grantees which are pertinent to the Grant, in order to make Audits, examinations, excerpts, and transcripts.

3. Enforcement:

(a) Remedies for Noncompliance. If the Government of the Republic of the Marshall Islands or its Sub-Grantee materially fails to comply with any term or condition relating to records retention or to the reporting on and monitoring of a Grant during the course of the Grant year, the United States may take one or more of the following actions:

- (1) Temporarily withhold cash payments pending correction of the deficiency by the Government of the Republic of the Marshall Islands.
- (2) Disallow the use of funds provided pursuant to the Compact, as amended, or the Supplemental Education Grant, and disallow Matching credit for all or part of the activity or action not in compliance.
- (3) Wholly or partly suspend or terminate the current award.
- (4) Take other remedies that may be legally available.

(b) Hearings and Appeals. In taking an enforcement action, the Government of the United States will provide the Government of the Republic of the Marshall Islands an opportunity to a hearing, Appeal, or other administrative proceeding to which it is entitled under this Agreement.

(c) Effects of Suspension and Termination. The Government of the Republic of the Marshall Islands shall not obligate funds during a Suspension or after Termination of an award unless expressly authorized by the Government of the United States. Costs which are necessary and reasonably unavoidable are allowable if:

- (1) The costs result from Obligations that were properly incurred before the effective date of Suspension or Termination, are not in anticipation of it, and, in the case of a Termination, are non-cancelable.
- (2) The costs otherwise would be allowed if the award were not suspended or expired normally at the end of the funding period in which the Termination takes effect.

## **Article VII**

### **Terms and Conditions of Infrastructure Assistance**

1. Infrastructure Grants shall be subject to all laws and regulations governing the use of Grant funds provided by the Government of the United States to the extent these apply to this Agreement. Grant funds may not be used for any purpose other than for which they are offered.
2. Draw downs for reimbursement of actual or Accrued Expenditures shall be accomplished using a format provided by the Government of the United States or as mutually agreed.
3. Prior to the draw down of funds, the Government of the Republic of the Marshall Islands shall provide the following documentation to the Government of the United States:
  - (a) Evidence of title, leasehold agreement, or other legal authority for use of the land upon which the capital improvement project(s) is to be constructed.
  - (b) A detailed project budget for each capital development project. The budget shall include a breakdown of costs (in-house and contracts) for planning, engineering and design, real estate costs, supervision and administration, construction, and construction management and inspection. The format of this submission shall be as mutually agreed by the Government of the Republic of the Marshall Islands and the Government of the United States.
  - (c) A scope of work that describes the work to be performed and the schedule from planning through completion of construction. A certified professional engineer or architect shall sign both the scope of work and budget for each construction project.
4. Prior to the draw down of funds for actual project construction, the Government of the United States may request to review the set of construction plans and specifications, a revised detailed cost estimate, and a detailed construction schedule.

5. All Grant monies shall remain available until expended, unless otherwise provided in this Agreement.

6. Failure to comply with program objectives, terms and conditions, or reporting requirements may result in the Suspension of Grant payments until the deficiency is corrected.

7. Infrastructure Maintenance Fund. Five percent of the annual public infrastructure Grant shall be set aside, with an equal contribution from the Government of the Republic of the Marshall Islands, as a contribution to an infrastructure maintenance fund to be established, maintained and utilized pursuant to the terms and conditions of this section 7 (the "IMF"). The Government of the Republic of the Marshall Islands may also allocate additional amounts from the health and education Sector Grants to fund the maintenance requirements of those sectors.

(a) The funds shall be deposited in an operations and maintenance assistance account established by the Government of the Republic of the Marshall Islands.

(b) The Government of the United States shall deposit its contribution upon: certification by the Government of the Republic of the Marshall Islands that local Matching funds have been deposited or upon receipt of a deposit schedule and, beginning in Fiscal Year 2005, an annual financial report from the previous year showing the deposits of both the Government of the United States and the Government of the Republic of the Marshall Islands, the amount of income generated during the Fiscal Year, and the fund balance.

(c) The IMF shall be available for use following the annual transmittal of an infrastructure maintenance plan by the Government of the Republic of the Marshall Islands for concurrence in writing by the Government of the United States.

8. Reporting Requirements:

(a) A Standard Form SF 269 or a reasonable facsimile thereof approved by the Government of the United States, shall be prepared quarterly and submitted within 30 days after the end of the quarter to which it applies. The report shall include accounting information and a status of progress for each project funded by the Grant.

(b) A Federal Cash Transactions Report, or Standard Form SF 272 of the Government of the United States or a reasonable facsimile thereof approved by the Government of the United States, shall be submitted quarterly within 30 days of the end of the quarter to which it applies. Actual dates, project identification, and amounts of draw downs for the quarter should be supplied in the "Remarks" section of the form.

## Article VIII Audit

### 1. Standards and Scope of Audit Authority of the Government of the United States:

Audit officials or agents of the Government of the United States, acting pursuant to and in accordance with section 232 of the Compact, as amended, may perform Audits on the use of all funding provided pursuant to the Compact, as amended, including Grants, programs and services, and other assistance provided to the Government of the Republic of the Marshall Islands. The Government of the United States is responsible for all costs attendant to the discharge of this authority.

### 2. Audit Responsibility of the Government of the Republic of the Marshall Islands:

(a) A financial and compliance audit, within the meaning of the Single Audit Act, as amended (31 U.S.C. 7501 et seq.), of the uses of the funding provided pursuant to the Compact, as amended, by the Government of the Republic of the Marshall Islands, shall be performed for each Fiscal Year during which Title Two of the Compact, as amended, is in force. The results of these Audits shall be available not later than the beginning of the third fiscal quarter following the end of the Fiscal Year under review.

(b) For purposes of these Audits, the laws and regulations of the United States shall apply which are relevant to the Compact and Compact, as amended, related agreements, and such other instruments as may be made expressly applicable pursuant to mutual agreement by the Government of the United States and the Government of the Republic of the Marshall Islands. In general, the applicable laws and regulations are those promulgated under the authority, and at the discretion, of the Government of the Republic of the Marshall Islands and which relate in a material, substantial or direct way to that Government's financial statements and operations.

(c) The authority of the Government of the United States set forth in section 232 of the Compact, as amended, and this Article shall continue for at least three years after the last Grant or element of assistance by the Government of the United States has been provided and expended.

### 3. Audit Officials:

(a) Audit officials from the Government of the United States are the officials and employees of the Government of the United States who are responsible for the discharge of its audit responsibilities, including those of the Comptroller General of the United States and any Inspector General of an agency of the Government of the United States, with programs operating in or otherwise serving the Republic of the Marshall Islands. While present in the Republic of the Marshall Islands for the purposes of this Agreement, audit officials from the Government of the United States shall be immune from civil and criminal process relating to words spoken or written and all acts performed by them in their official capacity and falling within their functions, except insofar as such immunity may

be expressly waived by the Government of the United States. The Comptroller General and his duly authorized representatives and other audit officials from the Government of the United States shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by a competent judicial authority, and such persons shall enjoy immunity from seizure of personal property, immigration restrictions, and laws relating to alien registration, fingerprinting, and the registration of foreign agents. Such persons shall enjoy the same taxation exemptions as are set forth in Article 34 of the Vienna Convention on Diplomatic Relations. The privileges, exemptions and immunities accorded under this paragraph are not for the personal benefit of the individuals concerned but are to safeguard the independent exercise of their official functions. Without prejudice to those privileges, exemptions and immunities, it is the duty of all such persons to respect the laws and regulations of the Government of the Republic of the Marshall Islands.

(b) Audit officials from the Government of the United States shall provide the Government of the Republic of the Marshall Islands with advance notice of the specific dates and nature of their visits prior to entering the Republic of the Marshall Islands and shall show verifiable identification to officials of the Government of the Republic of the Marshall Islands when seeking access to records. In the performance of their responsibilities under this Agreement, audit officials from the Government of the United States shall have due regard for the laws of the Republic of the Marshall Islands and the duties and responsibilities of the officials of the Government of the Republic of the Marshall Islands. Officials of the Government of the Republic of the Marshall Islands shall cooperate fully to the extent practicable with the United States audit officials to enable the full discharge of their responsibilities. Questions with respect to the identity or authorization of United States audit officials shall be referred for resolution to the United States Representative referred to in Article V of Title One of the Compact, as amended.

(c) The Comptroller General of the United States, and officials of the United States General Accounting Office acting on his or her behalf, shall have coextensive authority with the executive branch of the Government of the United States as provided in this Article of this Agreement and section 232 of the Compact, as amended. The audit officials from the executive branch of the Government of the United States shall avoid duplication between their audit programs and those of the United States General Accounting Office. The Government of the Republic of the Marshall Islands shall cooperate fully to the extent practicable with the Comptroller General of the United States in the conduct of such Audits as the Comptroller General of the United States determines necessary in accordance with this Article to enable the full discharge of his responsibilities.

4. Access to Records:

(a) The Government of the Republic of the Marshall Islands shall provide audit officials from the Government of the United States with access, without cost

and during normal working hours, to all records, documents, working papers, automated data, and files which are relevant to the uses of funding received pursuant to the Compact, as amended, by the Government of the Republic of the Marshall Islands. To the extent that such information is contained in confidential official documents, the Government of the Republic of the Marshall Islands shall undertake to extract information that is not of a confidential nature and make it available to the audit officials from the Government of the United States in the same manner as other relevant information or to provide such information from other sources.

(b) In order to reduce the level of interference in the daily operation of the activities of the Government of the Republic of the Marshall Islands, audit officials from the Government of the United States shall, to the extent practicable, inform the Government of the Republic of the Marshall Islands of their need for information, including the type of information and its relation to their annual audit schedule. To the extent practicable, the Government of the Republic of the Marshall Islands shall make available the information requested by audit officials from the Government of the United States relevant to Audits and available in a manner consistent with generally accepted accounting procedures that allows for the distinction of the Grants, assistance, and payments provided by the Government of the United States from any other funds of the Government of the Republic of the Marshall Islands. Such information shall be used and returned as quickly as accurate audit testing and surveying allow.

(c) The Government of the Republic of the Marshall Islands shall maintain records, documents, working papers, automated data, files, and other information regarding each such Grant or other assistance for at least three years after such Grant or assistance was provided.

5. Review of Audits:

Audit organizations and officials from the Government of the United States, including the Comptroller General of the United States and his duly authorized representatives, shall provide the Government of the Republic of the Marshall Islands with at least 45 days to review and comment on draft audit reports prior to the release of the reports. The comments of the Government of the Republic of the Marshall Islands shall be included, in full, in the final audit reports. Should a draft audit report be revised based on the comments of the Government of the Republic of the Marshall Islands, the Government of the Republic of the Marshall Islands shall have an additional period to review and comment on the report prior to its release.

**Article IX**

**Annual Reconciliation and End-of-Grant Requirements**

1. The Government of the United States shall reconcile Operational Grants at least annually, and evaluate program performance and financial reports to determine work progress, outcomes, and compliance with Grant terms and conditions.

2. The Government of the United States shall close out each award at the end of each annual Grant year once it determines that all applicable administrative actions and required work has been completed or if all Grant monies for that year have been expended.

(a) Within 90 days of the expiration of the Grant year, the Government of the Republic of the Marshall Islands must submit all final financial, performance, and other reports required as a condition of the Grant. The Government of the United States may Grant an extension of the due date upon the request of the Government of the Republic of the Marshall Islands.

(b) Within 90 days after receipt of reports in paragraph (2) of this section, the Government of the United States shall make upward or downward adjustments to the allowable reimbursable costs.

(c) The Government of the Republic of the Marshall Islands shall immediately refund any balance of cash not authorized to be retained. The refunded balance shall be available for use to supplement subsequent Grants.

3. The Government of the United States shall retain the right to disallow costs and recover funds on the basis of a later audit or other review. The Closeout of a Grant does not affect the obligation of the Government of the Republic of the Marshall Islands to return any funds paid in excess of the amount to which it is finally determined to be entitled under the terms of the award. Such an amount shall be deemed to constitute a debt to the Government of the United States. If the amount owed is not repaid within a reasonable period, the Government of the United States may reduce the debt by:

(a) Making an administrative offset against other requests for reimbursement;

(b) Withholding advance payments otherwise due to the Government of the Republic of the Marshall Islands; or

(c) Taking other action described in this Agreement or as otherwise permitted by law.

## **Article X**

### **Effective Date, Amendment, and Duration**

1. This Agreement shall enter into force the same date as the Compact, as amended.

2. This Agreement may be amended at any time in writing by mutual consent of the Government of the United States and the Government of the Republic of the Marshall Islands.

3. Disputes:


(a) Disputes involving sections 4, and 5(c)(1) of Article IV, and Articles III, V, VII and VIII shall be resolved in accordance with the Appeal process defined in Article I of this Agreement.

(b) All other disputes may be resolved in accordance with the Appeal process defined in Article I of this Agreement or through the conference and dispute resolution process set forth in Article II of Title Four of the Compact, as amended. Withholdings or Suspensions of payment shall stand unless otherwise determined through the conference and dispute resolution process of Article II of Title Four of the Compact, as amended.

4. This Agreement shall remain in full force and effect until either (i) the expiration or Termination of all assistance provided under section 211 of the Compact, as amended, all grants provided for the purposes authorized under section 105(f)(1)(B) of the Compact of Free Association Amendments Act of 2003, all Grants administered under section 221 of the Compact, as amended, and any financial assistance under section 222 of the Compact, as amended; or, (ii) termination by mutual written consent, whichever occurs first. The Government of the United States shall provide any unobligated Grant balances from the last Fiscal Year of the effectiveness of section 211(a) of the Compact, as amended, except those unobligated Grant balances associated with sections 211(b)(1), and 211(b)(3) of the Compact, as amended, to the Government of the Republic of the Marshall Islands in accordance with the procedures set forth in this Agreement and without regard to whether the Compact, as amended, its related agreements, or this Agreement are still in force. In this case, the funds shall be budgeted and expended pursuant to the purposes set forth in Article II of this Agreement.

5. Interpretation. In this Agreement, all references herein to Articles and sections shall be deemed references to this Agreement unless the context shall otherwise require. References to statutes or regulations or regulations are to be construed as including all statutory or regulatory provisions, as applicable, consolidating, amending or replacing the statute or regulation referred to. All references to agreements and other documents as amended, modified, supplemented or restated from time to time in a manner consistent with the terms and conditions of this Agreement. Except as otherwise expressly provided herein, all terms of an accounting or financial nature shall be construed in accordance with Generally Accepted Accounting Principles, as in effect from time to time in the United States of America.

DONE at Waparo RMI in duplicate, this 23rd day of March, 2004, each text being equally authentic.

  
Greta N. Morris  
Ambassador

FOR THE GOVERNMENT OF THE  
UNITED STATES OF AMERICA:

  
Gerald Zackios  
Minister of Foreign Affairs

FOR THE GOVERNMENT OF THE  
REPUBLIC OF THE MARSHALL  
ISLANDS: